Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	**§**	
Truth-in-Billing and Billing Format	**§**	**CC Docket No. 98-170**
National Association of State Utility	**§**	
Consumer Advocates' Petition for	**§**	**CG Docket No. 04-208**
Declaratory Ruling Regarding Truth-in-	**§**	
Billing: Further Notice of Proposed	**§**	**(FCC 05-55)Title**
Rulemaking	**§**	

REPLY COMMENTS OF THE
ATTORNEYS GENERAL OF
ARIZONA, CALIFORNIA, MINNESOTA, TENNESSEE, TEXAS, AND VERMONT

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I. Introduction

On June 24, 2005, the undersigned Attorneys General filed initial comments regarding federal Truth-in-Billing regulations in response to the Federal Communications Commission's ("FCC" or "Commission") Second Report and Order, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, ("TIB Order 2").[1] In those comments, fifty-one Attorneys General, on the basis of their extensive experience with consumer complaints, investigations and enforcement actions related to telecommunications billing practices, offered substantial evidence to the Commission of significant consumer confusion related to misleading practices in billing for telecommunications services. The Attorneys General urged the Commission to (a) prohibit carriers from imposing "carrier add on charges"[2] to consumer bills since it is these add ons which undermine competition by making it virtually impossible for consumers to compare prices among providers; (b) in the alternative, submitted that if such are allowed, these line items should be clearly defined, accurately stated, separated from taxes and regulatory fees and not described as related to government charges, fees or taxes. Finally, the States urged the Commission to reject proposals which would preempt the States' role with respect to matters such as billing practices.

In this proceeding, wireline and wireless carriers submitted initial comments in which, generally speaking, they opposed any additional truth-in-billing regulations, strongly urged the Commission to issue a broad regulatory declaration preempting states, advocated for definitions of "mandated" and "non

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[1]Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, CC Docket No. 98-170, FCC 05055, 2005 WL 645905 (rel. March 18, 2005).

[2]"Carrier add on charges" refers to charges which are determined by the carrier and are not taxes or regulatory fees expressly mandated by federal, state or local authorities. These add-on charges are to be distinguished from taxes and regulatory fees which federal, state, or local authorities require carriers to collect from consumers and remit to the appropriate governmental entity in association with the sale of telecommunications services.

mandated" charges consistent with their current billing practices, and almost uniformly opposed granting states enforcement authority under any rules which the Commission might adopt. These positions were based in part on the perspective that the current competitive market protects consumers, that additional rules will stifle competition and that carriers have adopted a voluntary code of conduct which addresses truth-in-billing and point of sale disclosure concerns. These comments, however, offered the Commission nominal, and in some instances, no legal analysis or factual support. For example, the comments favoring preemption of states neglected to even consider the strong anti-preemptive effect Section 601 of the Telecommunication Act of 1996 adds to already expressly limited preemption provisions and previously enacted savings clauses. Nothing submitted would serve to justify the FCC's departure from its well established approach, which recognized the effectiveness of joint state-federal actions in protecting consumers against deception and fraud in telecommunications.

In this reply, the States submit that comments filed demonstrate that (1) confusion over telecommunications bills is a significant problem that undermines competition; (2) the voluntary code adopted by some of the carriers fails to resolve billing problems; (3) preemption of state authority over billing practices is not supported in law; (4) the dormant commerce clause has no bearing on the preemption issue here, especially since Congress expressly provided that the states play a regulatory role; (5) any federal rules on point of sale disclosures must complement state authority; and (6) state enforcement authority is independent from federal authority and necessary in a competitive market.

The States submit that in today's pro competitive regime in which neither federal nor local agencies actively regulates rates by tariffed filings, Congress has recognized that states must play an even greater role in protecting consumers than in the past era of protective rate regulation. Contrary to views expressed by the carriers in initial comments, the FCC has no authority to thwart Congress' intent in this regard.

II. Confusing Telecommunications Bills are a Significant Problem, Impede Customer Choice and Thwart Competition

A. There Is Ample Evidence That There Is a Problem with Billing Practices

In both the wireline and wireless contexts, the Commission has previously determined that there are significant problems with telecommunications bills. With respect to wireline services, in 1999, the Commission considered "an extensive record on both the nature and volume of customer complaints, as well as substantial information about wireline billing practices."[3] The Commission made a similar determination in the wireless context in 2005.[4]

Those findings are supported by the fact that the wireless industry is recognized as one of the top generators of customer complaints. In 2004, the Council of Better Business Bureaus received approximately 28,000 complaints about the wireless industry-*more than for any other industry*.[5] In 2004, the Commission itself received approximately 18,000 complaints about wireless carrier practices in the categories of "billing & rates" and "marketing & advertising."[6] Similarly, the States' experiences reflect that for the last five years, surveys of state Attorneys' General offices reflect that telecommunication related complaints rank in the top four of all consumer complaints.[7] Although some may argue that the

[3] 14 FCC Rcd.17090, ¶ 15 (1999).

[4] 20 FCC Rcd. 6448 ¶ 16 (2005).

[5] Initial Comments of AARP *et. al*, at 2 (June 24, 2005).

[6] *Id*.

[7] *See* Comments of Undersigned Attorneys General at 3 (June 24, 2005) ("AG Comments").

number of these complaints is minimal in comparison to the number of telephone subscribers, it is well established that only a small percentage of disgruntled consumers actually take the time to complain to a government agency.[8]

A primary reason for consumer complaints is undisclosed charges that appear on a wireless bill after the customer has become financially obligated to the service. According to market research conducted by TNS Telecoms, the average residential wireless consumer spends $17.75 per month more than the advertised price of the applicable monthly plan, and most of this amount is attributable to line items added to the bill by the carrier.[9]

This high level of consumer complaints and the nature of those complaints prompted a multi-state investigation by Attorneys General into misleading advertisements and deceptive practices in the wireless industry, which in 2004 resulted in the entry of settlement agreements between the Attorneys General of 32 states and three major wireless carriers.[10] Similarly, in May 2004, a bipartisan and overwhelming majority of the Minnesota Legislature passed the "Consumer Protections for Wireless Customers" statute based on numerous complaints that carriers unilaterally changed significant terms of service contracts without customer consent.[11]

B. A Representative Sample Wireless Bill Illustrates that Carriers Engage in Confusing Billing Practices

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[8] *Id*.

[9] Reply Comments of Tracfone Wireless, Inc, at 6 (August 13, 2004).

[10] 20 FCC Rcd. 6448, ¶ 12 (2005).

[11] Brief of Minnesota Attorney General, *Cellco Partnership v. Mike Hatch*, United States Court of Appeals, 8th Circuit, No. 04-3198, pp. 6-8.

The current confusion in telecommunications bills can be illustrated by analyzing a sample bill. The sample bill analyzed below was included with comments filed by Leap Wireless International, Inc.[12] This bill reflects a charge for "MONTHLY SERVICE" of $44.99. However, there is an additional "MONTHLY CHARGE" for "REGULATORY RECOVERY" in the amount of $0.45. These two line items are added together to compute the "MONTHLY CHARGES," which total $45.44. This amount, however, is not what the customer is required to pay.

Eight other line items are added to the "MONTHLY CHARGES" to compute "CURRENT CHARGES." The first four of these line items are for taxes and immediately following these four line items for taxes, four more line items are added:

(1) $0.50 charge for "AR WIRELESS 911 SURC;"
(2) $0.43 charge for "AR UNIVERSAL SERVICE;"
(3) $0.16 charge for "FEDERAL USF FEE;" and
(4) $0.02 charge for "FED REGULATORY FEE."

These eight line items are added to the "MONTHLY CHARGES" for a "CURRENT CHARGES" total of $51.31 but this amount is not what the customer is required to pay. In addition to the "MONTHLY SERVICE FEE," "MONTH REGULATORY RECOVERY CHARGE" and the eight line items described above, the bill lists additional "FEES" including a $0.55 "PAPER BILL FEE" which in this case is added to a $15.00 "REINSTATEMENT FEE" to compute all "FEES." Thus, the "AMOUNT DUE" total which the customer must pay is, in fact, $84.20.

Further confusion is caused by the fact that a consumer reviewing this bill could reasonably assume incorrectly that any or all of the four line items listed immediately after line items for taxes are themselves

[12] Comments of Leap Wireless International, Inc., Attachment (July 14, 2004) (Leap Wireless Comments).

taxes which the carrier is required to collect from the consumer and remit to the government. That suggestion is made by listing these four line items immediately after line items for actual taxes. Similarly, the $0.45 regulatory recovery charge easily could appear incorrectly to be a 1% tax on the monthly service charge of $44.99.

The States submit that this sample bill is confusing and typical of bills of other carriers. Arguments that there is no problem with billing in the telecommunications industry ignore the reality reflected in these types of widely accepted billing practices.

C. Customer Confusion Over Bills Is Harmful to the Development of a Competitive Market.

The problem of confusing telecommunications bills is harmful to competition by making price comparisons cumbersome and difficult for consumers. Consider the range in charges imposed by five leading wireline and wireless carriers for recovery of regulatory compliance as listed on Table 1. The largest amount of $2.83 charged by Nextel in certain markets is over six times higher than the charge of $0.45 imposed by Leap Wireless for recovery of regulatory compliance.

These carrier add-on charges for some (but not all) of the carriers' costs of doing business are in addition to the carriers' charges for services. Therefore, the charges for services are artificially understated by different amounts for different carriers. Consumers cannot compare service offerings and prices to make decisions; they also must consider these and numerous other line items for which they as consumers receive no services or goods in return. Meaningful price comparisons are extremely difficult for consumers in this environment, and the confusion undermines the potential benefits of competition.

Table 1 - Comparison of Regulatory Compliance Charges Imposed by Leading Telecommunications Carriers

Carrier	Name of Charge	Amount per Month
Leap Wireless International, Inc.[13]	Regulatory Compliance Fee	$0.45
BellSouth Corporation[14]	Carrier Cost Recovery Fee	$0.99
AT&T Corp[15]	Regulatory Assessment Fee	$0.99
Cingular Wireless LLC[16]	Regulatory Cost Recovery Fee	Up to $1.25
Nextel Communications Inc.[17]	Federal Programs Cost Recovery Fee	Between $1.55 and $2.83

Rational billing in a competitive retail market should be easily understood. The telecommunications market should not be encumbered by the confusing practice of artificially understating the charge for services and then adding line items for some of the carrier's costs of doing business.

D. Unnecessary Information Gaps Prevent Customer Choice and Lead to Market Inefficiency

There are many specific problems associated with confusing telecommunications bills. One problem is that the bills are so cumbersome that consumers have difficulty simply understanding the actual

[13] Leap Wireless Comments at 12 (July 14, 2004).

[14] BellSouth Corporation's Opposition to Petition at 9 (July 14, 2004).

[15] AT&T Corp. Opposition at 5 (July 14, 2004) (AT&T Opposition).

[16] Opposition to Petition of Cingular Wireless LLC at 8 (July 14, 2004).

[17] Comments to Nextel Communications, Inc. And Nextel Partners, Inc. at 6 (July 14, 2004).

charge for services. Then, some of the line items are given descriptions that could be interpreted as taxes on consumers, when in reality they are not. Beyond this is the lack of accountability as to whether the amounts collected by carriers for specific line items actually equal these costs of doing business purportedly passed through to consumers. Consumers do not confront similar problems when purchasing milk from the grocery store or a haircut from a barber, and there is no rational economic reason to preserve these problems in the market for telecommunications services.

The telecommunications market is further characterized by practices that inhibit the ability of consumers to change service providers, a condition which further detracts from the ability of competition alone to solve these information problems.

In the wireless industry, in particular, consumers are often locked into purchasing services from a specific carrier by long-term contracts that include substantial early termination fees, some as high as $240.[18] If after entering into a contract, the customer learns that his provider will requirement payment of previously undisclosed charges that a competing provider would not impose, the customer would still not change providers because it would mean incurring early termination penalties much greater than the potential savings from switching carriers. Even if the customer pays the early termination penalty to change carriers, the new carrier could amend the agreement by adding or increasing discretionary line item charges. For instance, AT&T Corp. imposed the $0.99 per month Regulatory Assessment Fee unilaterally on its customers effective July 1, 2003.[19]

Thus, there is a combination of factors that have led to deception and confusion of consumers in

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[18] Cingular Wireless LLC Opposition to Petition, attached Wireless Services Agreement (July 14, 2004).

[19] AT&T Opposition at 5 (July 14,2004).

the telecommunications industry, including factors such as: (1) confusing bills and misleading line items; (2) failure to fully and fairly disclose all charges at the point of sale; (3) the practice of carriers adding or amending charges and other terms and conditions after the customer has purchased the service; and (4) imposition of early termination penalties for cancellation of service before the end of the contract term. As a result of the interplay between these factors, customers cannot fairly compare between carriers, and cannot accurately compare rates at the time of purchase. Under these circumstances, a truly competitive market cannot function.[20]

Consequently, the real issue in this proceeding is not rate regulation – the States agree that carriers should be able to charge whatever rates the market will bear. The real issue is the proper disclosure of rates and charges, and of unilateral changes in terms and conditions that impact the charges customers must pay. These disclosure issues fall within the ambit of state consumer protection statutes, and implicate the regulation "terms and conditions" of service which fall under state jurisdiction under 47 U.S.C. §332(3)(a) in the case of wireless carriers, and state specific utility regulatory statutes in the case of wireline carriers.

E. Pricing in the Current Telecommunications Industry Is Inconsistent with Truth-In-Billing Regulations

The practice of adding line items for selected costs of doing business separate and apart from the

[20] To illustrate this point, consider the following example. If a consumer attempts to compare and contrast the wireless plans of Carrier A and Carrier B, Carrier A might charge $25 per month for service while Carrier B charges $27 per month for service. However, Carrier A might have five carrier add-on charges that total $4 per month, while Carrier B has two carrier add-on charges that total $1 per month. Although the service plan offered by Carrier A appears on the surface to be cheaper, in reality Carrier B's plan is cheaper. If the customer somehow figures out the reality of the cost comparison, he or she would have to pay Carrier A an early termination fee of say $100 to terminate the two-year contract in order to save $1 per month. Then if the customer actually pays the $100 to terminate the contract with Carrier A and signs a new two-year contract with Carrier B, Carrier B might raise its carrier add-on charges to $5 per month, pursuant to a one-sided contract provision that permits the carrier to raise its carrier add-on charges during the term of the contract. In order to switch carriers again, the customer would have to pay an early termination fee of say $150 to Carrier B. A truly competitive market cannot function in this environment.

price for services is inconsistent with 47 C.F.R. § 64.2401(b):

> Descriptions of billed charges. Charges contained on telephone bills must be accompanied by a brief, clear, non-misleading, plain language description of ***the service or services rendered.*** The description must be sufficiently clear in presentation and specific enough in content so that customers can accurately assess that ***the services for which they are billed*** correspond to those that they have requested and received, and that the costs assessed ***for those services*** conform to their understanding of the price charged. (Emphasis added).

The clear underlying assumption of this regulation is that telecommunications carriers should bill their customers for services. There is no provision in this regulation for billing customers for selected costs of doing business. The underlying assumption of this regulation, i.e., that carriers should bill their customers for services, is consistent with rational billing in a competitive market.

Taxes and similar fees that the government requires the carrier to collect from consumers and remit to the government are different. Consumers understand the concept of paying taxes and similar fees to the government in the form of additional charges on their bills. It is this same consumer understanding about taxes, however, that causes confusion when line items are added that are not for services, goods, or taxes on consumers. If telecommunications bills included only charges for services and goods plus additional line items for taxes and similar fees that the government requires the carriers to collect from consumers and remit to the government, the ability of consumers to compare prices and service offerings would be significantly enhanced, and competition would benefit.

III. CTIA Consumer Code Fails to Resolve the Problem of Confusion Over Billing Practices and Is Unenforceable

Some carriers argue that the Commission need not regulate wireless carriers because many now have agreed among themselves to voluntarily abide by the CTIA's Consumer Code for Wireless Service.[21] The CTIA Code is an unenforceable set of industry goals meant to forestall comprehensive regulation of consumer rights in transactions with wireless carriers.[22] Any suggestion that the CTIA Code acts as an effective deterrent to protect consumers against wireless carriers' misleading billing practices and failures to disclose all charges for service at the point of sale can be countered by the simple recognition that the Code is, at best, aspirational and in no way enforceable. CTIA's assertion that competition will assure compliance with the Code is undermined by the fact that wireless carriers continue to engage in practices that mislead and confuse consumers as explained in the Attorneys' General initial comments.

The States further note that the CTIA Code includes only one recommendation which touches on billing practices – found in the sixth point of the Code. That point provides that carriers must distinguish between "monthly charges for services and features and other charges collected and retained by the carrier" and "taxes, fees and other charges collected by the carrier and remitted [to government]" and suggests that carriers are not to label cost recovery fees directly as taxes.[23] There are no requirements regarding the manner in which those charges are to be distinguished and, as is clear from the examples set forth in these reply comments, carriers' bills which are purportedly in compliance with the voluntary code remain confusing.

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[21] CTIA is an organization of the wireless communications industry and includes wireless carriers and manufacturers. *See* Nextel/T-Mobile Letter, December 13th, 2004, at 5; *See also* Cingular Wireless Comments at 3; CTIA Comments at 2; T-Mobil Comments at 4. The CTIA Consumer Code for Wireless Service is available at http://www.CTIA.org/wireless_consumers/consumer_code/index.ctm (hereinafter "CTIA Code").

[22] Tech Law Journal Daily E-Mail Alert, September 12, 2003, Alert No. 738, *CTIA Announces Voluntary Consumer Code for Wireless Carriers*. Report is available at http://www.techlawjournal.com/alert/2003/09/12.asp.

[23] CTIA Code at 2.

This aspirational code falls short in several other respects, including disclosures. That is, while the code provides for disclosure of certain enumerated information about rate plans, it limits such disclosures to "new" consumers. Further, it provides that such material should be disclosed to consumers "in collateral or other disclosures at the point of sale," but fails to require clear and conspicuous notice of these disclosures. Finally, the CTIA Code does not require that the disclosures be made prior to customers signing a contract to ensure that consumers can act as informed participants in the market.

Most fundamentally, the CTIA Code, because it is voluntary, is unenforceable by any aggrieved party. Thus, while adoption of such a voluntary industry code may be a helpful *addition* to necessary legal standards and enforcement authority, it neither provides the protection that could be afforded from adoption by the Commission of meaningful truth-in-billing or point of sale disclosure rules, nor provides a basis to preempt states from doing so.

IV. States Have Power and Responsibility to Regulate Carrier Billing Practices, Congress Has Not Preempted That Authority, and Has Precluded its Implied Preemption

A. Carriers Ignore or Discount the Language of the Statute and Its Clear Purpose, Against the Guidance of Congress and the Courts

Carriers' arguments in favor of a preemptive declaration by the Commission[24] require that the agency disregard the law's plain language, obvious purpose, and legislative history. The bold declaration that the carriers seek is beyond the Commission's authority, contrary to the result Congress intended, and violates important rules of constitutional interpretation and statutory construction.

[24] *See, e.g.*, Comments of Cingular Wireless, LLC, at 34 (June 24, 2005) (Cingular Comments).

1. Congress Clearly Intended Neither to Preempt in This Area Nor to Confer Broad Preemptive Power on the Commission

Because the statutes at issue so clearly contemplate continued state regulation of billing practices, carrier comments have largely sidestepped the actual language of these statutes. Instead, they present general policy arguments based on their view of what would promote competition. Their claims of how those policies should be effectuated either ignore the history and context of the law or rely on unsupported and illogical readings of the statute and legislative history. Such arguments in favor of a broad Commission declaration of preemption in areas in which Congress expressly provided for continued state regulatory and enforcement authority would have the FCC act improperly and contrary to law.

2. Rather than Broadly Preempting the States from Regulating in this Area, Congress has Preserved State Authority and Precluded Implied Preemption

In arguing that the Federal Communications Act ("FCA") of 1934, 47 U.S. C. § 151 et seq. ("FCA")[25] somehow provides or allows for preemption of state law with respect to billing practices, and, further, that passage of the Telecommunications Act of 1996 ("Telecommunications Act")[26] somehow evinces an intent by Congress to adopt a policy that could result generally in the removal of state regulation that govern such practices, carriers misconstrue the nature, language, purposes and history of the FCA. In fact, Congress has repeatedly and expressly acknowledged and endorsed the States' continuing role in

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[25] Title 1, § 1, 48 Stat. 1064, as subsequently amended.

[26] Pub. L. 104-104, 110 Stat. 56.

regulating carriers with respect to matters such as billing practices.[27]

As detailed in the AG Comments, States have historically had power to regulate terms and conditions under which telecommunications carriers do business in their jurisdictions, including practices in billing consumers for services.[28] They were constrained only by judicial determination grounded in the filed rate doctrine and by judicial determination, made sparingly and with reluctance, of actual conflict between state law and Commission regulation authorized by the FCA.[29] As demonstrated in the record, regulatory proceedings, law enforcement actions, and private cases brought under state law have remedied numerous carrier billing problems and brought relief to hundreds of thousands, if not millions of consumers.[30] In fact, not only does the FCA not contemplate general preemption of state regulation of such carrier practices, it expressly prohibits the FCC itself from regulating in the field of intrastate telecommunications except under limited circumstances prescribed in the FCA.[31]

Congress evinced its intent not to preempt states in the field of telecommunications regulation, nor to authorize any broad preemption, through the savings clause included in the FCA, codified at 47 U.S.C. § 414. Congress further cemented this view in more recent amendments to the FCA and in the Telecommunications Act through repeated and enhanced recognition and preservation of state authority, except where it expressly provided otherwise.

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[27] AG Comments at 15-18.

[28] AG Comments at 14-15.

[29] AG Comments at 23-25, 27-29.

[30] AG Comments at 14-15.

[31] 47 U.S.C.A. § 152(b); see *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 360 (1986).

3. Carrier Comments Fail to Rebut That the 1993 OBRA[32] Amending Section 332 Provided Only for Limited Preemption, With Respect to State Regulation of Rates and Entry, and Only for CMRS Carriers

In 1993, when it added Section 332(c) to the FCA, 47 U.S.C. § 332(c), Congress expressly and narrowly provided that, with respect only to certain wireless telecommunications services ("CMRS"), the FCC would have exclusive jurisdiction over regulating the "rates and entry" of CMRS carriers, whether providing intrastate or interstate service. Congress made clear, however, that the states retain their traditional regulatory authority over CMRS carrier "terms and conditions." The 1993 OBRA did not otherwise broaden the FCC's jurisdiction, nor limit the regulatory authority of the states. In no respect did the 1993 OBRA empower the Commission either to broadly declare its occupation of a field or to specifically review state laws or regulations to determine the preemptive effect of the FCA or of its own regulations. Indeed, the narrow area in which Congress gave the FCC to regulate wireless carriers was expressly and unambiguously limited to rates and entry.[33] As explained below, the sweeping declaration of preemption urged by carrier comments is not justified by the language or purpose of the statute.

4. The Sweeping Preemptive Declarations Now Urged On The Commission Were Precluded By Congress In The Telecommunications Act

The inclusion of a pro-competitive purpose as one of the purposes of the Telecommunications Act does not override its express anti-preemptive provisions. In the Telecommunications Act, as discussed in AG Comments, Congress precluded the FCC from adopting preemptive declarations governing state rules

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[32] The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 ("1993 OBRA").

[33] 47 U.S.C. § 332(c).

in areas, such as billing practices, in which state power was preserved in the statute.[34] Where the Telecommunications Act did preempt states from some regulation, it did so only in limited circumstances that do not justify the preemption urged by carriers in this proceeding. In doing so, Congress took great care to preclude the kind of preemptive declaration now contemplated.

5. In Section 601, Congress Barred Any Interpretation of the Telecommunications Act That Would Preempt State Authority Where Not Expressly Preempted By the Statute

In the Telecommunications Act, Congress went beyond the existing savings clauses to express clearly its intent that the Telecommunications Act not be construed to imply any preemption. In Section 601(c)(1), which Congress labeled "No Implied Effect,"[35] Congress stated that the Telecommunications Act and its amendments "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." The plain meaning of this statutory language leaves no room for interpretation. Yet, for anyone who might doubt the meaning or purpose of that language, the legislative conference report spoke directly to the provision and in a manner wholly consistent with the States' reading. As the report stated:

> The conference agreement adopts the House provision stating that the bill does not have any effect on any other Federal, State, or local law unless the bill expressly so provides. *This provision prevents affected parties from asserting that the bill impliedly preempts other laws.*[36]

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[34] AG Comments at 15-17.

[35] 104th Congress Report of House of Representatives 2d Session 104-458, Telecommunications Act of 1996, Conference Report at p. 92.

[36] 104th Congress Report of House of Representatives 2d Session 104-458, Telecommunications Act of 1996, Conference Report at p. 201 (emphasis added).

Congress was clear. The Telecommunications Act contained provisions providing expressly for preemption of limited subject matter, scope and circumstances. No other or further preemption is implied.

In case law under the Telecommunications Act, courts have held precisely that. As a result of the copious manner in which Congress expressly provided for preemption in some respects and preserved state authority in others, and Section 601's clear prohibition of any construction of the Telecommunications Act implying preemption where Congress did not itself expressly preempt, courts have found that implied preemption under the Telecommunications Act is precluded.

In *Verizon Communications, Inc. v. Trinko*, 540 U.S. 398 (2004), the Supreme Court examined the antitrust-specific clause in Section 601(b)(1), which contains language that mirrors the more general prohibition against construing the Telecommunications Act to imply preemption set forth in Section 601(c). The Supreme Court rejected a claim that the Telecommunications Act must be implied to immunize parties from enforcement of antitrust law for conduct regulated by the Commission under the Telecommunications Act. The Court noted that, "[i]n some respects the enforcement scheme set up by the 1996 Telecommunications Act is a good candidate for implication of antitrust immunity, to avoid the real possibility of judgments conflicting with the agency's regulatory scheme."[37] But the Court found that with Section 601(b), "Congress . . . precluded that interpretation."[38]

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[37] *Verizon Communications, Inc. v. Trinko, supra,* 540 U.S. at 406.

[38] *Id.; See also Covad Communications Co. v. Bellsouth Corp*., 374 F.3d 1044 (11th Cir. 2004) (noting that *Verizon Communications, Inc. v. Trinko*, 540 U.S. 398 (2004), endorsed the prior Covad decision which had been vacated on other grounds, stating that "the FTCA savings clause barred a finding of implied antitrust immunity" and noting that the savings clause was expressly meant to co-exist with the Sherman Act); (prior decision was *Covad Communications Co. v. Bellsouth Corp*., 299 F.3d 1272, 1280-81(11th Cir. 2002), *vacated* on other grounds (finding that where Congress expressly preserved in the Telecommunications Act the application of other law, there can be no "plain repugnancy" between the two such that the Act should be read to imply preemption of the other).

More recently and in a case directly involving survival of state authority in the face of FCC regulation, the Fourth Circuit has found that Section 601, coupled with the FCA's more general savings clause, 47 U.S.C. § 414, "counsel against any broad construction" of the Telecommunications Act's goals that would imply state law preemption.[39] The Fifth Circuit has also found that Section 601(c)(1) precludes the Commission from declaring preemption of state authority under the Telecommunications Act in an area not expressly preempted by Congress holding that "Section 601 precludes a broad reading of preemptive authority."[40]

The cases on which carriers rely to argue that the Commission should by edict declare sweeping preemption fail to consider the impact of Section 601. In fact, Section 601 further serves to strengthen the requirements for strict adherence to Congress' express delimitation of preemption in Section 253 as discussed in the following section.

6. Section 253 Does Not Allow the Commission to Proclaim Preemption of State Regulation of Carrier Billing Practices

In Section 253, where the Telecommunications Act provides for some preemption, Congress took care in at least four important ways to preserve state regulatory authority and to preclude Commission preemption of state authority in areas, such as those addressed in this proceeding, outside of what was

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[39] *Pinney, M.D., v. Nokia, Inc.*, 402 F.3d 430, 458 (4th Cir. 2005) (holding state law claims regarding wireless telephones themselves not to be preempted by the FCA or by FCC regulation).

[40] *City of Dallas v. F.C.C*., 165 F.3d 341 (5th Cir. 1999) (reversing FCC rule that violated "plain meaning" of statute by preempting state franchise requirements for cable television open video system operators on theory that such requirements conflicted with congressional purposes) (holding that Section 601 "precludes a reading of preemptive authority" under the Telecommunications Act and also finding inappropriate any Chevron deference to the agency, because in that provision, Congress "already has resolved the issue of preemption.").

intended in the statute.

First, Congress expressly described the limited circumstances under which the Commission could preempt state authority under the Telecommunications Act.[41] Section 253, which Congress entitled "Removal of Barriers to Entry,"[42] declares that "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[43] Notably, the provision confines the scope of preemption to state authority that prohibits or has the effect of prohibiting telecommunications service. The provision, unlike the preemption of state authority in Section 332, does not even speak to rates, which carriers, as they must to make any argument, contend are at issue here. Section 253 only affects regulation of barriers to entry, clearly not an issue here. And, as discussed in AG Comments, unlike language used by Congress when it may want to preempt more broadly, the provision does not purport to encompass state authority "related to" the subject of preempted matter in Section 253(a).[44]

Second, Congress expressly made clear that even the preemption authorized in Section 253 does not generally extend to encompass state "requirements necessary to preserve and advance universal

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[41] 47 U.S.C. § 253(a).

[42] 104th Congress Report of House of Representatives 2d Session 104-458, Telecommunications Act of 1996, Conference Report at p. 16.

[43] 47 U.S.C. § 253(a).

[44] AG Comments at p. 17; *see also Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 377; see also *Total TV v. Palmer Communications, Inc.*, 69 F.3d 298, 302 (9th Cir. 1995) (explaining that the phrase "to regulate" "is associated with a more limited preemptive intent," whereas the phrase "related to regulation" "signifies a broad preemptive purpose sufficient to preempt state laws of general application"); *Cable Television Association of New York, Inc. v. Finneran*, 954 F.2d 91, 101 (2nd Cir. 1992) ("Where Congress has intended to pre-empt all state laws affecting a particular subject, it has employed language well suited to the task . . . . The courts have consistently interpreted the words 'relate to' in broad, common sense fashion. . . .").

service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[45] Thus, even some state regulation that could otherwise have prohibitive effect and violate Section 253(a) could not be preempted if expressly saved by Section 253(b).

Third, Congress plainly did not contemplate broad preemptive declarations of the kind now being suggested to the Commission. The statute itself states that any preemptive order be limited "to the extent necessary to correct" the anti-entry violation.[46]

And fourth, as discussed above, as provided in Section 601 of the Telecommunications Act, and reiterated in its contemporaneous Conference Report, Congress specifically precluded any interpretation implying preemption beyond the bounds of the statute's express preemptive language.

7. Other Authority Cited By Carriers Provides No Express Preemption And Offers No Support For Implied Preemption Of State Regulation Of Carrier Billing Practices

Carriers cite a grab-bag of other sections of the law in arguing that preemption of carrier billing practices was somehow intended or implied under the Telecommunications Act, or is in some way necessary to effectuate the law's purposes. As explained in AG Comments[47] and further described above, such a determination would be contrary to Congress' clear intent and is not supported in the cited statutory provisions.

Some carriers have cited Section 2(b) of the FCA, 47 U.S.C. § 152(b), but that section actually

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[45] 47 U.S.C. § 253(b).

[46] 47 U.S.C. § 253(d).

[47] AG Comments at 14-26.

is a savings clause that prohibits the Commission from regulating intrastate services. It does not preempt; nor does it authorize preemption in any area.[48]

Carriers also point to Sections 201, 202 and 205 for authority that they give to the Commission to rule on whether carrier rates and other practices for interstate communications services are "just and reasonable."[49] These provisions, however, have no effect on state protection of consumers or regulation of intrastate services; nor do they trump the manner in which Section 332 allows for state regulation of terms and conditions for CMRS carriers, while preempting only state regulation of CMRS rates and entry.[50]

8. Section 332 of the FCA Expressly Preserves State Authority to Regulate CMRS Terms and Conditions, Which Congress Certainly Understood to Encompass Matters Including But Well Beyond Carrier Billing Practices

Some carriers argue that the FCC should establish regulations under Section 332 that purport to preempt the States well beyond what Congress regarded as the area intended for preemption in the 1993 OBRA.[51] As the Commission has acknowledged, Congress explained that its intent in leaving intact under Section 332 state authority to regulate "other terms and conditions" of CMRS, encompassed at least "such matters as customer billing information and practices and billing disputes and other consumer protection matters . . . or such other matters as fall within a state's lawful authority."[52] In fact, in using the expansive

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[48] *See, e.g.*, Sprint Comments at 4 (June 24, 2005); Cingular Comments at p. 6.

[49] *See*, *e.g*., Comments of Cingular at 8-9, 27 (citing to sections 201, 202 and 205) (June 24, 2005); Comments of Verizon Wireless, at 27 (citing to section 201) (June 24, 2005) (Verizon Wireless Comments); Comments of CTIA - The Wireless Association™, at 36, 42 (citing section 201(b)) (June 24, 2005) (CTIA Comments).

[50] AG Comments at p. 25.

[51] *See* Nextel Comments at p. 26-27.

[52] TIB Order 2 at Paragraph 32, quoting H.R. Rep. No. 111, 103d Cong., 1st Sess., at 261 (1993).

language in the Conference Report to describe what it meant, at a minimum, by reference to "terms and conditions" in Section 332, Congress clearly indicated its broad expectation of the role that state authority would play in CMRS regulation. As discussed in detail in AG Comments, "rates" are "rates" and, as courts have held, rates clearly cannot be understood to encompass the entire relationship between consumers and carriers, particularly in the context of clear contrary language in the statute.[53]

The suggestion that the FCC should preempt state authority despite the clear congressional intent, language of the statute, and savings clauses that are directly inconsistent with preemption of state billing practices is improper and should be rejected. While some comments focus on the preemptive effect of an agency's action within the scope of its delegated authority,[54] that authority does not extend to allow the Commission to pass regulations that are directly contrary to the language and obvious purpose of the statute. The Supreme Court has previously rejected arguments that, contrary to statutory limits to its authority, the Commission can nevertheless "take action which it thinks would best effectuate a federal policy. An agency may not confer power upon itself."[55] "To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant the agency power to override Congress."[56]

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[53] AG Comments at 17-19.

[54] *See, e.g.*, CTIA Comment at 37, Verizon Comment at 16, Cingular Comment at 7, Nextel Comment at 21, T-Mobile Comment at 16 (June 24, 2005), SBC Comment at 11 (June 24, 2005), and Coalition for a Competitive Telecommunications Market Comment at 2 (Junee 24, 2005) (CCTM Comments).

[55] *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 335, 374 (1986).

[56] *Id.*; *See also American Libraries Association v. FCC*, 406 F.3d 689, 708 (D.C. Cir. 2005) (rejecting FCC's assertion of authority in area related to but outside that delegated to it by Congress as "an extraordinary position," in which the court found the agency claimed "*plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area") (emphasis in original, citations omitted).

As the *Pinney* court found, examining Section 332, "in pursuing its objective of ensuring the availability of a nationwide network of wireless service coverage, Congress has been very careful to preempt expressly only certain areas of state law, preserving the remainder for state regulation."[57] That intent should not be ignored or circumvented.

In short, as detailed in AG Comments, because Section 332 proscribes state regulation only with respect to rates and entry and specifically preserves state authority to regulate CMRS in other areas, it does not authorize the Commission to reach out and declare a broader preemptive scope or to redefine terms Congress meant one way to mean something different.[58]

B. Congress' Careful Delegation Of Only Limited Authority to the Commission and the Many Express Savings Clauses Throughout Chapter 5 Of Title 47 Preclude Any Implied Preemption Or Declaration By the FCC That it Occupies the Field of Carrier Billing Practices

Despite carrier assertions to the contrary,[59] what Congress enacts, and what it means, always matter in determining whether state power is preempted by federal law or regulation. In cases arising under statutes in which Congress expressly preempts to some extent, but reserves state authority, the Supreme Court has repeatedly examined whether Congress intended to preempt state law directly or to provide agency authority to preempt. Thus, in *Cipollone v. Liggett Group, Inc.*, the Court found that, because Congress had declared the extent of preemption in the statute at issue, the scope of preemption was

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[57] *Pinney*, *supra* note 39, at 458.

[58] AG Comments at 17-21.

[59] CITA Comments at 42.

governed by the express statutory language.[60] The Court explained:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation.[61]

Applying *Cipollone*, the Commission should not broadly preempt state regulation of carrier billing practices because Congress clearly did not intend such preemption, and preemption should not be implied given the explicit applicable statutory language regarding the areas in which state law is either preempted or preserved.

For several reasons, the holding in *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000) does not alter that analysis. First, in *Geier* the Court found preemption based on its finding of actual conflict between enforcement of substantive federal safety regulations and the state law claims asserted by the plaintiffs.[62] The holding does not disturb the proposition that there can be no implied field preemption where Congress expressly reserves the application of state law within the field. Second, *Geier* did not involve questions about the agency's authority to issue the regulations at issue. And third, while stating in *Geier* that the presence in the statute of preemption language coupled with a general savings provision did not necessarily preclude implied preemption, the Court did not simply ignore the savings clause. It considered the language of the provision and determined that it did not evince congressional intent to

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[60] *Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 517 (1992).

[61] *Id.* (internal citations omitted).

[62] *Geier* at 874.

preserve the state law action brought by plaintiffs in that case. The language and context of the provisions at issue in *Geier* contrast mightily with the clear and express language at issue now. There was no language in the savings clause at issue in *Geier* that remotely approached what Congress provided in preserving a particular state regulatory role under Section 332 of the FCA, as discussed in AG Comments and in this reply comment. Certainly, Congress had not, in the statute at issue in *Geier*, expressly commanded that no preemption be implied from its enactment, as it did with Section 601 for the Telecommunications Act.

Nor, as asserted by carriers, does the Court's opinion in *Fidelity Savings and Loan Assoc. v. De la Cuesta*, 458 U.S. 141 (1982) offer a proper path to the Commission's proposed preemption by regulation of state authority expressly preserved by Congress in the FCA.[63] In *De la Cuesta*, although there were some state law savings provisions in the statutory scheme, the Court found, unlike in the statutes at issue in this proceeding, no specific savings clause applicable to the kind of state law subject to the agency's preemption. The *De la Cuesta* Court did not have before it any provision like that in Section 601 expressly declaring congressional intent to preclude implied preemption.

Carriers put much reliance on *City of New York v. F.C.C.*, 486 U.S. 57 (1988), and its holding that the Commission did not act improperly in preempting state and local technical standards governing cable television signals. *City of New York*, however, was decided under Section 624(e) of the Cable Communications Policy Act of 1984, codified at 47 U.S.C. §544. The Court determined in *City of New York* that Section 624 of the Cable Act had expressly provided for the Commission to adopt rules preempting in that area, and found in detailed analysis of the Cable Act and its legislative history that such

[63] CTIA Comments at 40, nt. 105; Sprint Comments at 8, nt. 30; and Verizon Wireless Comments at 21, notes 65 and 67.

preemption was entirely consistent with what Congress had intended in passing that statute.[64] *City of New York* ultimately provides not for the broad preemptive authority that the Commission would need to override congressional intent, but for the kind of focused consideration of congressional language and purpose that carriers seeking such preemption would sidestep in this proceeding. The Court's conclusion in that case, that it could "find nothing in the Cable Act which leads [the Court] to believe that the Commission's" decision to preempt was contrary to congressional intent,[65] is not one that could be made on the matters at issue in this proceeding. Congress clearly has intended there be no preemption of state regulation of matters such as carrier billing practices, as discussed elsewhere in AG Comments and in this comment.

Section 332 plainly preserves state CMRS regulation that does not set rates or prevent market entry, including any other "terms and conditions." As argued elsewhere in AG Comments and this comment, Congress meant to include within that broad savings clause the kinds of regulation that the Commission now contemplates preempting.[66] And, as the Fifth Circuit Court of Appeals stated, in *City of Dallas v. F.C.C.*, any claim that the Telecommunications Act confers authority on the FCC to preempt state law that is outside the carefully defined areas in the Act where Congress expressly preempted a role for states is explicitly precluded.[67]

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[64] 486 U.S. at 66-69.

[65] *Id*. at 69.

[66] AG Comments at 17-19.

[67] 165 F.3d 341, 348 (5th Cir. 1999) (holding that Section 601(c) "precludes a broad reading of preemptive authority" under the Telecommunications Act, and also finding inappropriate any *Chevron* deference to the agency, because in that provision, Congress "already has resolved the issue of preemption.").

Carriers' examples of state regulations that would impede the carriers' national business serve instead to illustrate why attempting to determine if all state oversight and regulation can or should legally be preempted is unwarranted and irresponsible in this proceeding. Generally, carriers offer as examples of purported obstructive billing regulations provisions that have either been unchallenged for more than twenty years, that are not currently in effect, or that do not even address telecommunications billing. Even as to those provisions that are effective, by their selective descriptions, carriers attribute only illusory effects of these statutes or rules. Certainly, carriers have not shown that any of these provisions has ever impeded any of them from competing effectively, or that any of these provisions constitutes rate or entry regulation. None suggest that the FCC should depart from its prior focused approach of examining on a case-specific basis whether a particular state statute or rule strayed into a preempted area.

For example, SBC cites a statute that requires it to identify those components of its bills which are mandated by the FCC.[68] That statute has been law since at least 1983 and was last amended in 1991.[69] SBC claims that multiple required billing formats could frustrate and confuse consumers, particularly, SBC's large customers whose bills may cover several states. Apparently, SBC has never found this billing requirement so overreaching or burdensome to its large customers as to challenge it during those more than 20 years the statute has been in effect. Moreover, the statute does not even require any particular line item, but merely requires, at the carrier's option, that the charges either be identified with an asterisk or similar means referencing a phrase identifying the charges as imposed "by action of" the FCC or requires a listing

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[68] SBC Comments at 14.

[69] Cal. Pub. Util. Code § 786, West's Annotated California Codes (2005).

somewhere on the bill of the "total charges imposed by tariff" of the FCC.[70]

The Coalition for a Competitive Telecommunications Market ("CCTM") cites a state cramming regulation.[71] As CCTM admits, however, that provision does not even govern billing practices for telecommunications goods or services at all, but, rather services that are *not* telecommunications goods or services.[72] Indeed, the applicable state definition of "telecommunications services" is so broad that the only items left affected by the rule are ones that are neither transmission of information (of any sort) by wire, radio, etc., nor goods and services related to the transmission of information.[73] CCTM even objects to a provision that allows a state utility commission to deny registration if the entity has engaged in "false or deceptive billing practices . . . ." The FCA clearly allows, and courts have upheld, states' power to protect consumers from false and deceptive conduct, even in connection with market entry.[74] In objecting to a carrier having to provide a state with basic information about how it will bill for services, including how often and details of the billing statement,[75] CCTM contends a state might block entry if the state does not like the answers. Whether those particular regulations might be applied so as to deny entry is pure speculation. Such a consideration is best left to a proceeding by a carrier actually denied entry, were there such a carrier, rather than trying to guess at the impact in this general proceeding.

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[70] Cal. Pub. Util. Code § 786.

[71] CCTM at 8.

[72] CCTM at 8.

[73] New Mexico Admin Code, Title 17 § 11.8.7 O.

[74] *See* 47 U.S.C. § 253(b); *See also* 47 U.S.C. § 332(c)(3)(A); *See also Communications Telesystems Int'l v. California Public Utilities Comm'n*, 196 F.3d 1011, 1017 (9th Cir. 1999).

[75] CCTM Comments p. 7.

Verizon and T-Mobile go so far as to object to state rules that are not even in effect.[76] T-Mobile cites to a state regulation that was never fully implemented.[77] T-Mobile asks the Commission to imagine states promulgating regulations that specify a particular font and font style and how difficult that would be for carriers, but cites to no regulation that has ever specified font style as well as size. Of course, requirements that certain consumer documents be in large enough type to be legible or to call attention to particularly important provisions are commonplace in both federal and state law, and all sorts of other businesses that operate nationally or internationally comply.

The FCC has previously refused to engage in speculation and should not do so now.[78] This restrained preemption conduct has served it well. The examples carriers offer, despite the sky-is-falling rhetoric in which they are cloaked, do not support a break from the Commission's past reasoned approach.

V. The Dormant Commerce Clause Has No Bearing on the Commission's Decision

A couple of industry comments argue that the "dormant" Commerce Clause, U.S. Const. Art. I, § 8, cl.3, presents a constitutional obstacle to the continued role of the states in regulating billing format. For the reasons set forth in the AG Comments,[79] this argument is unconvincing.

First, the dormant Commerce Clause plays no role where, as here, Congress expressly provided

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[76] Verizon Comments at 18; T-Mobile Comments at 14.

[77] T-Mobile Comments at 14.

[78] *Implementation of Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996: Unauthorized Changes of Consumer's Long Distance Carriers*, 64 F.R. 7746, 7755 (Feb. 1999) (expressing an intent to determine preemption on a case by case basis and refusing to find preemption of state slamming verification procedures absent a sufficient record).

[79] *See* AG Comments at 27-29.

that the states play a regulatory role.[80]

Second, even without such instruction from Congress the Commerce Clause would not prohibit state involvement in truth-in-billing regulation.

Essentially conceding this point, Cingular frames its Commerce Clause argument as one that merely offers "principles" in "support" of *preemption* under the Supremacy Clause, the Commerce Clause is no obstacle in itself to a continued role for the States.[81] The point missed, however, is that the Commerce Clause is no bar to state regulation at issue in this proceeding, principles purportedly embedded in that constitutional provision should not bear on a determination of *preemption* under a wholly separate provision, i.e., the Supremacy Clause, U.S. Const., Art. VI, § 2.

Cingular's non-Commerce clause Commerce clause argument postulates in particular that the resident of one state whose proximity to the borders of other states might require wireless carriers to comply simultaneously with several states' billing-format requirements.[82] But whatever the merits of an *as-applied* constitutional challenge based on that peculiar factual situation, neither Cingular nor any other party could bring a *facial* challenge to a rule based on these circumstances. The burden rests squarely on the party bringing a facial challenge – or, as here, arguing for a complete prohibition – to show that there is no

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[80] *See White v. Mass. Council of Constr. Employers, Inc*., 460 U.S. 204, 213 (1983); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945).

[81] Cingular Comments at 35.

[82] *See* Cingular Comments at 35-39.

set of facts under which the rule would be constitutional under the Commerce Clause.[83] The carriers have not met that burden, nor can they do so. There is no reason, for example, to believe that more than one state would attempt to regulate billing formats for any given telecommunications consumer. A bill is sent to an address and the address will be in only one state. This fact was relevant to the Supreme Court's analysis upholding the constitutionality under a dormant Commerce Clause analysis of a state tax on telecommunications that was limited to calls charged to an in-state service address. *Goldberg v. Sweet*, 488 U.S. 252, 263 (1989) (noting possibility of states applying tax based on location of service or billing address).

Because wireless service is mobile, the incident that logically ties it to a state is the associated billing address. The likelihood is that states will apply any billing requirements to those calls billed in their state, so there would be no conflict. Moreover, if there were a statute alleged to impose a burden on interstate commerce that would in fact outweigh, under the traditional dormant Commerce Clause balancing test,[84] the benefit to consumers of enhanced clarity and competitive pricing, then those actually affected could bring an as-applied challenge. Such an as-applied challenge would have the salutary feature of addressing an actual rather than hypothetical conflict.

As the *Goldberg* Court recognized in analyzing the statute before it, there are ways of ensuring that marginal problems are addressed without violating fundamental principles of federalism and the dual sovereignty that has long guided telecommunications regulation in this country. *See Goldberg* at 263. For

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[83] *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982).

[84] *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

well over a century, states have effectively joined with the federal government in regulating the business practices, including the billing practices, of telecommunications providers. Despite carrier' assertions in this proceeding, there is no reason to believe that such a time-tested and reliable format cannot and should not continue to govern the field.

VI. Wireline and Wireless Carriers Should Be Required to Separate Taxes and Fees They Are Mandated to Collect from Customers from Their Own Add-on Charges[85]

Generally speaking, in their written comments, wireline and wireless carriers alike oppose any additional truth-in-billing regulations[86] and/or alternatively advocate for definitions of "mandated" and "non-mandated" charges consistent with their current and varied billing practices.[87] The legal and policy positions articulated by many commentators illustrate the carriers' disparate billing approaches which ultimately confuse and mislead consumers and have resulted in increasing numbers of consumer complaints.

To address the growing problem of confusion with carriers' bills, the Commission should establish national labeling standards that can be enforced at the state level, independently of state consumer protection laws. In this regard, the Commission should follow its proposal to define "mandated" charges as "amounts that a carrier is required to collect directly from customers, and remit to federal, state or local

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[85] In initial comments, the States argued for the establishment of two categories of charges: (1) price, and (2) taxes and regulatory fees. More specifically, the States urge the Commission not to allow carriers a third category referred to as "carrier add-on charges." The recovery of charges under this later category, which includes discretionary line items, should be incorporated into the price for the service. In the alternative, the State argued for three categories: (1) price, (2) taxes and regulatory fee; and (3) carrier add-on charges. Without waiving their preference for two categories of charges, the States respond to carriers' proposed definitions of "mandated" and "non-mandated" charges.

[86] *See* SBC Comments at 3-4; T-Mobile Comments at 1; and Comments of the National Telecommunications Cooperative Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies and the Western Telecommunications Alliance at 2 (Small Carriers Comments).

[87] *See* Nextel Comments at 4 and 8; Cingular Comments at 46-47.

governments" and require that "mandated" charges be listed separately from "non-mandated" charges. The States recommend that "mandated" charges be referred to as "Taxes and Regulatory Fees" and "non-mandated" charges be referenced as "Carrier Add-On Charges" on customers bills.

Verizon Wireless claims in its initial comments that there are three kinds of charges that carriers typically collect from customers: (1) charges that the government requires a carrier to collect from its customers and remit, such as a sales tax; (2) charges the carrier estimates it owes a governmental entity, such as federal universal service or property tax; and (3) charges that carriers impose on customers but the carrier does not owe to the government.[88] As explained in their initial comments, the State Attorneys General note that there are really only two kinds of charges: "taxes and regulatory fees" that carriers are required to collect from customers and remit to the government and "carrier add-on charges"[89] that carrier impose on customers at their discretion and keep as revenues.

The Commission offered, however, two alternative proposals to address line items. Under the Commission's first proposal, the first category of charges listed above would be defined as "mandated" charges, and categories two and three would be considered "non-mandated" charges (hereinafter "Proposal 1"). In contrast, under the Commission's second proposal, categories one and two would be defined as "mandated" charges and category three would be considered "non-mandated" charges (hereinafter "Proposal 2"). Proposal 1 is more consistent with the position of the Attorneys General in the their initial comments, although we reiterate that non-mandated charges should be incorporated into the price for the service.

[88] Verizon Wireless Comments at 39-40.

[89] AG Comments at 1.

In their comments, carriers took disparate positions consistent with their billing systems and circumstances, but basically made recommendations that fall into four categories: (1) separate "mandated" and "non-mandated" charges following Proposal 1;[90] (2) separate "mandated" and "non-mandated" charges following Proposal 2;[91] (3) eliminate distinction between "mandated" and "non-mandated" charges and identify *all* government imposed fees, whether required or permitted to be passed on to consumers as "government-mandated charges," and allow carriers to fashion other categories of charges as they see fit;[92] and (4) do nothing because there is no need for further truth-in-billing rules.[93]

The Attorneys General submit that the most logical of the listed recommendations for the Commission to adopt is Proposal 1 because the other alternatives lead to greater billing confusion. Any definition of "mandated" or "government-mandated" charges that allows carriers to list assessments that the government requires carriers to remit, but does not require carriers to collect from customers, such as federal universal service, is *per se* misleading – because the customer will wrongly conclude that the discretionary carrier add-on charges are government-imposed. Consequently, the consumer does not have complete and accurate information necessary to compare prices among competitors.

In a broader sense, the Commission has framed the debate over "mandated" and "non-mandated" charges in terms of whether it should model proposed rules based on the Assurance of Voluntary Compliance (AVC) that the top three wireless carriers signed originally with 32 states, or the CTIA Code

[90] *See* Cingular Comments at 47; Nextel Comments at 3; and Verizon Wireless at 40.

[91] *See* T-Mobile Comments at 8; CTIA Comments at 8; and CCTM Comments at 16.

[92] *See* SBC Comments at 4; Sprint Comments at 19; and AT&T Comments at 6-7.

[93] *See* Small Carrier Comments at 4; and Verizon Comments at 2.

that has been voluntarily signed by over 30 small and large wireless carriers. The Commission acknowledged that Proposal 1 is consistent with the AVC, while Proposal 2 is similar in approach to the CTIA Code.[94] For the same reason expressed above, the Commission should fashion its truth-in-billing rules after the AVC. To do otherwise would give carriers a license to mislead consumers.

On the question of whether it is unreasonable for line items to combine federal regulatory charges, AT&T supports the proposition on the basis that the Commission has failed to explain why such charges must be set forth in separate line items if their description in a single line item combining those charges is clear.[95] This response would be reasonable only under certain circumstances. The approach to this question depends on how the Commission addresses the issue of how to define "mandated" and "non-mandated" charges. If Proposal 1 is followed, and "mandated" fees are limited to charges that carriers are required to collect from consumers and remit to the government, then the combination of several mandated federal regulatory charges under one line item would raise little concern, beyond full disclosure of itemized charges to the consumer. However, if Proposal 2 is followed, then combining so-called regulatory charges under the same line item without further itemization of the charges would raises serious concerns because carriers could hide administrative and other discretionary charges as "mandatory" charges. Under this scenario, it would be possible for a carrier to be in compliance with Commission regulations, yet mislead and deceive consumers. This approach leads to irrational pricing as discussed in section II of these reply comments.

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[94] Second FNPRM at ¶¶ 40-41.

[95] AT&T Comments at 10-11.

On the issue of whether labeling requirements should stop at separating government "mandated" and "non-mandated charges," or whether there should be more specific standardized labeling of categories of charges establishing national uniformity, Sprint, AT&T, Verizon Wireless, and CCLM raised strong objections to labeling beyond the separation of "mandated" and "non-mandated" charges.[96] AT&T and Verizon Wireless support their position with legal arguments based on the First Amendment (these arguments are addressed in section VIII of these reply comments), while Sprint and CCLM argue that such labeling is inconsistent with how carriers may structure their rates in a competitive market. In this regard, CCLM opposes labeling requirements that would prohibit carriers from developing their own naming conventions for line items. Specifically, CCLM argues, that carriers should be free to recover expenses such as "property taxes, regulatory compliance costs and billing expenses" under line items labeled "regulatory assessment fees" or "universal connectivity charge," or other carrier-prescribed label.[97]

CCLM's argument illustrates the problem with the current debate. On the one hand, carriers claim that in a competitive market they should be free to recover expenses as line items on bills because this is part of structuring their own rates and the Commission should not "micro-manage" this process. On the other hand, however, they fail to show restraint in the manner in which they would recover such expenses to the point of misleading consumers. They argue that the Commission cannot or should not establish labeling requirements for line items on bills that at a minimum separate "mandated" and "non-mandated" charges. CCLM would have carriers recover as "regulatory assessment fees" – a category of charges deceptively phrased as a mandatory fees – taxes that are not triggered by the sale of telecommunications

[96] *See* Sprint Comments at 19; AT&T Comments at 7-9; Verizon Wireless Comments at 41-45; and CCLM Comments at 18.

[97] CCLM Comments at 18.

services (property taxes), discretionary carrier add-on charges (regulatory compliance costs), and cost of doing business (billing expenses). Property taxes and billing expenses should be integrated into the price for the service as is customary in other industries subject to competition. In turn, discretionary charges, if not part of that price, should be properly identified as "carrier add-on charges" on carrier bills.

At a minimum, the Commission should establish federal labeling requirements for "mandated" charges consistent with the AVC. However, the Commission should not create a "safe harbor" that would insulate carriers from state consumer protection laws. As the examples above show, it is possible for carriers to be in compliance with federal regulations and still mislead or deceive consumers. To the extent that the Commission establishes new truth-in-billing regulations, they should act as a floor of consumer billing protection, allowing states to continue to address carriers that use misleading or unfair billing practices that confuse customers or make it difficult or impossible for consumers to compare prices. This model of shared state/federal enforcement authority has worked well in the context of billing and there is no reason to change it now and undermine the flexibility that states have in responding to carriers that engage in deceptive billing practices which confuse and mislead consumers.

VII. Requiring Carriers to Provide Customers with Point of Sale Disclosures Prior to the Customer Signing a Contract Will Promote Informed Customer Choices and Competition

Comments submitted by members of the wireless industry suggest that there is no widespread or strong opposition to the Commission's proposal to require carriers to provide consumers with point of sale disclosures, and some affirmatively state that they do not oppose the imposition of this type of requirement. One carrier (Verizon Wireless) challenges the FCC to first obtain empirical evidence before imposing this requirement and others do not directly address the question posed by the FCC regarding whether or not such disclosures are needed.

With respect to the substance of point of sale requirements, the carriers generally take the position that such should be consistent with the AVCs; that the Commission should allow carriers to disclose a range of potential surcharges, so long as the consumer is apprised of the highest potential amount. Some carriers emphasize that the FCC should clarify that carriers should be required to disclose only the information that is known to them as they cannot foresee how taxes and fees might change. One carrier takes the position that the FCC's proposal to disclose the full rate is faulty because the FCC fails to define "full rate" and further urges that it is impossible for point of sale disclosures to be made before a consumer signs a contract since customers must choose all features and provide addresses BEFORE the carrier can provide full rate information and that billing cycle information is not available until a customer activates service which only occurs after a contract is signed.

With respect to the proposed requirement of point of sale disclosures, the FCC's articulated goals are "to facilitate the ability of telephone consumers to make informed choices among competitive telecommunications services" and to have "these obligations apply nationwide to all carriers."

The States, on the basis of their respective experiences with consumer complaints and related investigations and enforcement actions, submit that without point of sale disclosures regarding material terms of service, consumers cannot make informed choices. Indeed it was in part on the basis of this experience that 32 states undertook the actions which resulted in settlements with three major wireless carriers in which those three agreed to provide consumers with point of sale disclosures. Requiring that these point of sale obligations apply nationwide to all carriers would level the playing field. Further, it would cause carriers to fall into compliance with state consumer protection laws which they would otherwise be in violation of by failing to disclose material terms to consumers.

While the States agree that the FCC's requirements regarding point of sale disclosures should be consistent with those embodied in the AVCs, the States note that the AVCs do not dictate an all inclusive list of information that must be disclosed at point of sale. Instead, the AVCs require that carriers disclose "all material terms and conditions of an offer," *including* a list of specific items. This approach recognizes that in an industry characterized by rapidly evolving technology and competitive pressures, the material terms which consumers may need to know in order to make an informed choice are not likely to remain static and may vary from region to region. Further, information related to innovations in service can be most critical to disclose to consumers since it is such information with which they are the least likely to be familiar.

In terms of whether point of sale disclosures should be made prior to a consumer signing a contract, the States strongly concur with the FCC's tentative conclusion that these must be made before the consumer signs the contract. In fact, providing these disclosures to a consumer only AFTER he signs a contract would clearly undermine the stated goal of facilitating the consumer's ability to make an informed choice. If disclosures are required only AFTER the signing of a contract, a consumer's comparison shopping would require the signing of a series of contracts in order to determine the cost of services. To the extent that some carrier's systems are not currently set up to facilitate providing this material information to consumers prior to the time that the consumer obligates him or herself by signing a contract, the States suggest that the FCC consider a phase in period to give these carriers time to implement changes to their systems. Finally, with respect to allowing carriers to utilize an estimate for taxes and regulatory fees in these disclosures, the States urge that the actual charge to the consumer ultimately not be in excess of 10% greater than the estimated surcharge.[98] To the extent that the Commission requires the inclusion of specific terms in point of sale disclosures, the States would urge the Commission to assure that terms used in the point of sale disclosures be consistent with terms used in consumers' bills.

VIII. The Disclosure of Line Items on Bills Does Not Violate the First Amendment

The argument that disclosure requirements violate the First Amendment rights of carriers is incorrect. Disclosure requirements receive less First Amendment protection than restrictions on commercial speech. Disclosure requirements need only be "... reasonably related to the State's interest in preventing deception of consumers." *Zauderer v. Office of the Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

It is not certain that the act of adding line items to a bill is speech. The Supreme Court has said, "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 392 U.S. 367, 376 (1968).

In addition to the issue of its own First Amendment rights, the industry has raised as an issue the First Amendment rights of consumers. In this context, bill recipients are analogous to a captive audience. *See Frisby v. Schultz*, 487 U.S. 474, 485 (1988); *Rowan v. United States Post Office Department*, 397 U.S. 728, 738 (1970). The fact that customers cannot merely discard their bills distinguishes this fact

[98]For example, if the estimated taxes and regulatory fees disclosed are $5.00, the ultimate charge to the consumer should not exceed $5.50.

pattern from the cases addressing First Amendment rights in the context of billing inserts and unsolicited mail.

Even if adding line items to a bill is speech and even if a bill recipient is not a captive audience, the nature of a bill as a demand for money from the bill recipient is a significant factor in the First Amendment analysis. According to the Supreme Court, "Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions v. Conrad*, 420 U.S. 546, 557 (1975).

Moreover, there is no First Amendment protection for misleading speech, e.g., like the deceptive line items illustrated above. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980). Even if one were to argue that not every line item is *per se* misleading, regulations on them clearly would be reasonably related to the government's interest in preventing deception of consumers. *Zauderer v. Office of the Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985).

IX. Any Enforcement Regime Adopted by the Commission Should Recognize the Value of State Federal Partnerships in Protecting Consumers and Promoting Fair Competition

With respect to enforcement matters, industry representatives almost uniformly oppose granting states enforcement authority, arguing that to allow such would in effect permit states to adopt their own rules and that since some of these rules will necessarily be ambiguous, there needs to be a "single adjudicator" and that the FCC may not lawfully subdelegate its authority to states. In response to the Commission's question regarding whether a federal/state enforcement regime similar to that which is in place with respect to "slamming" might be appropriate, many carriers' comments reflect the view that this is not a good model since slamming concerns a factual question of whether a consumer agreed to switch carriers or not, in contrast to the proposed rules which will, in the carriers' view, be subject to a greater range of interpretations. Almost all of the carriers concede that the states have a significant role to play with respect to these issues through their enforcement of laws of general applicability, such as consumer protection laws. The undercurrent flowing through this concession, however, consists of numerous statements by carriers suggesting that even those enforcement efforts and laws might be preempted in unspecified circumstances when such enforcement in some way "interferes" with federal policies or somehow amounts to back door regulation.

The States note first, that by seeking to establish an enforcement regime that recognizes the value of partnership with the States, the FCC is recognizing the role Congress granted to the states over "terms and conditions" under Section 332. A federal/state partnership with respect to enforcement is consistent with Section 332 and is, therefore, not an unlawful subdelegation of FCC authority to states. Second, the States urge the Commission to reject suggestions that consumer enforcement protection must be set aside whenever carriers advance the argument that such enforcement amounts to an interference with "federal policies." Failure to reject those suggestions invites carriers to later utilize any rules adopted by the Commission to attempt to assert sanctuary from state consumer protection efforts. Third, the States submit that the slamming model suggested by the Commission for an enforcement regime is a sound one which has been effectively utilized to substantially reduce the incidence of slamming complaints across the country. Contrary to the suggestion that enforcement of slamming rules is not a good model because the factual determination in those cases is a simple one subject to little interpretation, the States note that enforcement decisions regarding slamming rules, as is the case with most laws and regulations, of necessity includes elements of analysis, evaluation and judgment. For instance, the rules regarding letters of agency authorizing a change in carrier require that such be "at a minimum" printed with a type of "sufficient size and readable type to be clearly legible" and must contain disclosures of certain information using "clear and unambiguous language."[99] Similarly, in reviewing recorded verifications of authorizations state and federal enforcement authorities necessarily must evaluate whether carriers clearly disclosed to consumers that what they were authorizing was a switch in service providers. The slamming model is also far superior to the suggestion offered by carriers that the role of the states should be limited to receiving complaints, forwarding them to carriers for responses and in certain instances forwarding these complaints to the FCC for investigation. This latter proposal suggests a regime which would inefficiently use state government resources, frustrate consumers seeking relief and would limit enforcement to only those circumstances so egregious or widespread that the Commission deems them worthy of a federal enforcement action. Finally, the States would reurge the Commission to continue to recognize the value of the federal/state partnership which has served to protect consumers and promote fair competition in the marketplace.

Respectfully submitted,

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[99] *See* 47 C.F.R. §§ 64.1130(d) and (e).

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